CITY OF SAN JOSE
CAPITAL OF SILICON VALLEY

Memorandum

TO: Sunshine Task Force Public Records Subcommittee

FROM: Richard Doyle, City Attorney

DATE: December 12, 2007

SUBJECT: Public Records Requests Relating to Personnel Records

INTRODUCTION

On November 29, 2007, Bert Robinson, Chair of the Sunshine Task Force Public Records Subcommittee, requested that the City Attorney's Office provide a written memo in response to the following three questions:

1. What is the City's interpretation on when records relating to charges of misconduct against public officials must be made public?

2. What threshold applies to the charge, in terms of the level of confirmation that must be established to make it public? It seems clear that frivolous charges are treated differently from serious and well-founded charges, but where does the City draw the line?

3. Does the law prescribe any sort of differentiation based on an employee's status in an organization? For instance, is there greater protection of information regarding a lower-level employee than a higher level employee?

DISCUSSION

It is difficult to respond to these questions without the context of a specific request for records. The City does not have a formal policy on the disclosure of records in response to a public records request for personnel records. The City's response to a public records request for records of alleged employee misconduct is made on a case-by-case basis, and depends upon a number of factors including the individual at issue, the records sought, the nature of the alleged misconduct, the evidence supporting the allegations and an analysis of the law at the time the request is made.

A. The Public Records Act

The California Public Records Act ("Act") provides for the inspection of public records maintained by state and local agencies. Cal. Govt. Code §6250, *et seq.* Disclosure of public records involves two fundamental yet competing interests: (1) the prevention of secrecy in government and (2) the protection of individual privacy. See *Gilbert v. City of San Jose*, (2003) 114 Cal.App.4th 606, 610. The Act includes the following two exceptions, related to personnel records, to the general policy of disclosure of public records: (1) material expressly exempt from disclosures pursuant to Government Code Section 6254(c), i.e., the "personnel exemption;" and (2) material exempt from disclosure pursuant to Government Code Section 6255, i.e., the "catchall exemption."

1. The Personnel and "Catchall" Exemptions

Under the "personnel exemption," the Act exempts from disclosure "personnel, medical, or similar files, the disclosure of which would constitute an unwarranted invasion of personal privacy."[1] Cal. Govt. Code §6254(c). Under the "catchall exemption," the Act allows an agency to withhold public records where no express exemption may apply if the agency can demonstrate "that on the facts of the particular case the public interest served by not disclosing the record clearly outweighs the public interest served by disclosure of the record." Cal. Govt. Code §6255(a).

While the courts have provided some guidance on these exemptions, there is no bright line rule governing the disclosure of records involving misconduct by public employees. For example, in *AFSME v. Regents of University of California*, the appellate court acknowledged that the strong public policy against disclosure diminishes "where the charges are found true, or discipline is imposed." (1978) 80 Cal.App.3d 913, 918 (citing *Chronicles Pub. Co. v. Superior Court*, (1960) 54 Cal.2d 548, 575). However, the court noted that even then, the disclosure is limited to "information about the complaint, the discipline, and 'the information upon which it was based.'" *Id.* In *AFSME*, the case involved a Public Records Act petition seeking disclosure of the contents of a "voluminous" audit report conducted after allegations of financial irregularities of two employees of the University of California. *AFSCME*, 80 Cal.App.3d at 916. The University had refused to release any part of the actual report. *Id.* The trial court agreed with the University in part but allowed access to the exhibits to the report. The appellate court concluded, after an in camera review, that the audit report contained "many accusations wholly 'unsupported by evidence'. . . ., 'without substance'. . . [or] 'represent either entirely acceptable practices, or matters which appeared to be minor violations. . . . having no cost or other unfavorable consequences" and the court did not disclose those portions of the report. *AFSCME*, 80 Cal.App.3d, at 919. Ultimately, the appellate court disclosed only approximately nine (9) pages of what it described as a

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[1] In November 1972, the citizens of the State of California enacted the Privacy Initiative, which amended Section 1 of the Article of the Constitution to expressly make "privacy" one of the inalienable rights to which all people are entitled. The Constitutional right to privacy exists where there is a reasonable expectation of privacy in a legally protectable interest. *Hill v. National Collegiate Athletic Ass'n.*, (1994) 7 Cal.4th 1, 36-37. Precluding the dissemination of confidential information by government and private entities is a core legal interest protected by the Constitutional right to privacy. *Id.* at 35-36.

"voluminous" report and only to the extent those portions met the standard previously discussed.

In *Bakersfield City School District v. Superior Court*, the appellate court clarified *AFSME* by stating that disclosure of public employee wrongdoing included instances where the allegations are "substantial in nature, as distinct from baseless or trivial, and there is reasonable cause to believe the complaint is well-founded." (2004) 118 Cal.App.4 th 1041, 1046. In *Bakersfield*, once the trial court reviewed the personnel records of a school district employee, it denied disclosure of all of the personnel records except with regard to one incident, which the trial court described as "sexual type conduct, threats of violence and violence," because the complaint was "substantial in nature" and there was "reasonable cause to believe the complaint was well-founded." *Id.* at 1043-1044. As to the records for that one incident, the trial court ordered disclosure of certain records after redacting the names, addresses and telephone numbers of all persons mentioned except for the employee who was accused of the incident of misconduct. *Id.* Upon review, the appellate court balanced the competing interests of the right to privacy and the public interest served by disclosure. The appellate court held that the records ordered disclosed by the trial court did "reveal sufficient indicia of reliability to support a reasonable conclusion that the complaint was well founded" to outweigh the privacy interest. *Bakersfield*, 118 Cal.App.4 th at 1047.

2. Other Considerations in Evaluating a Request for Records

There are others factors to consider in disclosing records relating to employee misconduct, including the investigations of such misconduct. The success of personnel investigations depend on witnesses whose candor is assured by the expectation of confidentiality. See by analogy *Rackauckas v. Superior Court*, (2002) 104 Cal.App.4 th 169 (in a case involving the law enforcement investigation exemption, the court noted the importance that investigators feel free to candidly comment and communicate upon what they have learned through investigations, without fear of the chilling effect of disclosure upon them or their sources). Records could reveal unsubstantiated opinions of employee witnesses as to another employee's involvement, the identities of employees who participated in events but had no part in any misconduct, accusations totally unsupported by evidence, conduct which represents either entirely acceptable practices or matters which appear to be minor violations having no cost or unfavorable consequences. Disclosure of records containing such information may expose the City to liability for invasion of privacy and defamation claims.

Further, if there is a pending criminal investigation relating to the misconduct, employees who participated in the investigation and provided statements may not have waived their Fifth Amendment and Fourteenth Amendment rights against self-incrimination, and the disclosure of such statements may affect their right to a fair trial should criminal charges be filed.

3. Individual's Position in an Organization

Depending upon the position, an individual's position in an organization may impact the analysis of the personnel and "catchall" exemptions under the Act. For example, peace officer personnel records, including disciplinary actions, are confidential and may not be

disclosed. *Copley Press, Inc. v. Superior Court*, (2006) 39 Cal.4th 1272 (holding that Copley did not have a right under the Public Records Act to records of the county civil service commission relating to a peace officer's administrative appeal of a disciplinary matter, which were protected by statutes safeguarding officer's right of privacy under the Penal Code).

On the other hand, a recent case held that a public official in the position of school superintendent had a "significantly reduced expectation of privacy in the matters of his public employment," as compared to public employees who are not public officials, and the court ordered disclosure of a redacted version of an investigative report relating to misconduct allegations against the school superintendent. *See BRV v. Superior Court*, (2006) 143 Cal.App.4th 742, 758-759.

In *BRV*, a publisher sought disclosure of a report that analyzed allegations of misconduct by a school district's superintendent and high school principal, Robert Morris. The school district hired an investigator to prepare a report relating to allegations that Morris verbally abused students in disciplinary settings and sexually harassed female students. *Id.* at 746-747. Morris resigned effective at a future date that was over five months out. The future resignation was conditioned upon the school board accepting a written agreement that provided paid administrative leave through Morris's future resignation date, a salary increase, and an agreement not to release any documents, including the investigative report, from Morris's personnel file except with his consent or as required by law. *Id.* at 748-749.

While the appellate court found that Morris had a significant privacy interest in his personnel file, including the investigative report, the potential harm to those privacy interests did not outweigh the public interest in disclosure. *BRV*, 143 Cal.App.4th at 759. the court noted that "[w]ithout a doubt, the public has a significant interest in the professional competence and conduct of a school district superintendent and high school principal." *Id.* at 757. The court also noted that the public has a "significant interest in knowing how the District Board conducts its business and... how the Board respond to allegations of misconduct committed by the District's chief administrator." *Id.*

In reviewing *AFSME* and *Bakersfield*, the appellate court distinguished those cases because they did not involve a public official in the position as Morris. The court looked to *New York Times v. Sullivan* for the premise that as a public official, Morris "knew his performance could be the subject of public, 'vehement, caustic, and sometimes unpleasantly sharp attacks ...." *BRV*, 143 Cal.App.4th at 758-759; (citing *New York Times v. Sullivan*, (1964) 376 U.S. 254, 270, which found that the constitutional right of privacy must be balanced against the public's interest in its business in much the same way that the courts have sought accommodation of the reputational interests of the individual and the United States Constitution's First Amendment protections of press freedoms).

Because of Morris's status as a public official, the appellate court applied a "lesser standard of reliability than [it] otherwise would for a nonpublic official under the rule of *Bakersfield*." *Id.* at 759. Even though the investigator determined most of the allegations were not sufficiently reliable, the court could not conclude that the allegations were "so unreliable that the accusations could be anything but false." *Id.*

The report did, however, exonerate Morris of all serious allegations, but did not exonerate the allegations relating to outbursts of anger. *Id.* The court found that the "public's interest in understanding why Morris was exonerated and how the District treated the accusations outweigh[ed] Morris's interest in keeping the allegations confidential." *Id.*

The appellate court also found, however, that the "public's interest in viewing the ... report is not furthered by knowing the identities of any of the students, parents, staff members, or faculty members interviewed or mentioned in the report. Nothing in the record indicates that these persons are public officials such as Morris. Knowing their identities does not help the public understand how the Board responded to the allegations involving Morris." *Id.* "[T]hus, ... all names, home addresses, phone numbers, and job titles for such persons" were redacted before the report was released. *Id.*